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...October Term, 1989

...DEPARTMENT OF STATE POLICE and
...C. DAVIS, Director of the
...Department of State Police,

Petitioners,

...JOSEPH R. YOUNG, SR., DOMINIC J.
...CECIL ALLEN, KEITH MUXLOW and
...JACK WELBORN,

Respondents.

...Writ Of Certiorari To The
...Michigan Court Of Appeals

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QUESTION PRESENTED

Whether the Michigan Department of State Police sobriety roadblock program is unconstitutional under the Fourth Amendment of the United States Constitution.

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STATEMENT OF THE CASE

This action was filed in May 1986 on behalf of six members of the Michigan Legislature (hereinafter: "Plaintiffs"), seeking declaratory and injunctive relief prohibiting the Michigan Department of State Police and the Director of that Department (hereinafter: "Defendants") from instituting a program of sobriety roadblocks. Plaintiffs alleged that the roadblocks violated rights secured by both the Fourth Amendment of the United States Constitution and Article I, § 11 of the Michigan Constitution.

Hearings were conducted on Plaintiffs' Motion for Preliminary Injunction in May and June 1986 before the Honorable Michael L. Stacey of the Wayne County Circuit Court. During the course of these hearings, the parties stipulated that the trial court's decision on the Motion for Preliminary Injunction would also serve as the determination of Plaintiffs' additional request for permanent injunctive relief.

At the hearing, Plaintiffs demonstrated three general points: the manner in which the roadblocks would operate, how such roadblocks infringed on the privacy interests of the driving public, and, most importantly, that such roadblocks are not an effective means of addressing the drunk driving problem.

One of Plaintiffs' witnesses was Dr. Lawrence Ross, a professor of sociology at the University of New Mexico, and one of the nation's preeminent authorities on the subject of deterring the drinking driver. Dr. Ross testified that *any* law enforcement technique could have a short term favorable impact on drunk driving statistics if it

creates a public perception that detection and punishment of the drinking driver is somehow enhanced (App. 45a-46a, 72a). However, according to Dr. Ross's analysis of all studies on this subject, the deterrent effect of any drunk driving program diminishes rapidly if and when the driving public realizes that the prospects of detection and arrest as a result of the technique are not great (App. 53a-54a). This phenomenon of rapidly dissipating deterrent impact was described by Dr. Ross as a learning curve: in the short-term the public may alter its driving behavior in the face of a novel police practice, but, when the public recognizes that the program does not increase the certainty of punishment, it no longer influences behavior (App. 54a).

Dr. Ross also testified that the "learning curve" phenomenon would apply to sobriety roadblocks. To be effective for even a limited period of time, sobriety roadblocks must be widely publicized and instill in the public the perception that this police practice increases the possibility of detecting drunk drivers (App. 58a). However, Dr. Ross further testified that, as a tool for arresting drunk drivers, sobriety roadblocks are worthless (App. 55a-56a).

According to Dr. Ross, data taken from the studies of sobriety roadblocks indicate that less than one percent of all drivers who pass through such roadblocks are arrested for drunk driving, and no study ever conducted has indicated a high sobriety roadblock arrest rate (App. 55a-56a). Therefore, Dr. Ross concluded that once the driving public grasps the limited arrest threat posed by these roadblocks, whatever short term deterrent effect they might possess would dissipate (App. 58a-59a, 73a).

Consistent with this conclusion, Dr. Ross noted that no study of sobriety roadblocks has demonstrated a long term deterrent effect on drunk driving (App. 56a).

Dr. Ross's conclusion that sobriety roadblocks are not effective in fighting drunk driving was reiterated by three other witnesses called by Plaintiffs, each of whom was a county sheriff in Michigan.

Macomb County Sheriff William Hackel testified that his county has implemented a number of programs which have succeeded in removing drunk drivers from the roads. Based on his 23 years of experience in law enforcement, Sheriff Hackel concluded that these alternative programs would be more efficient and effective in arresting and deterring drunk drivers than sobriety roadblocks (App. 86a-88a). Sheriff Hackel further testified that the Michigan Sheriffs' Association, of which he was President, voted to formally oppose the use of sobriety roadblocks in Michigan because of their ineffectiveness (App. 94a).

Sheriff Hackel's expert opinions on the inefficiency of sobriety roadblocks were shared by Kalamazoo County Sheriff Thomas Edmonds and Wayne County Sheriff Robert Ficano. Sheriff Edmonds testified that traditional road patrols, in which officers stop drivers for alcohol related offenses based on observed driving behavior, are more effective than roadblocks in combating drunk driving (App. 101a). He also testified that the ineffectiveness of roadblocks, as compared to roving patrols, would be even more pronounced in the rural areas of his county (App. 103a).

Sheriff Ficano also emphasized that roving patrols, which stop vehicles based on an individualized suspicion, would more efficiently address the drunk driving problem than roadblocks (App. 113a). For this reason, Wayne County has refused to participate in the State Police roadblock program, and has no plans to adopt such a program (App. 114a).

The testimony of Sheriffs Hackel, Edmonds and Ficano reflected a single overriding concern. As county sheriffs, their jobs consist of providing citizens with the most effective method of fighting crime consistent with economic constraints. All three agreed that roving patrols would constitute a more effective use of limited law enforcement resources than committing 12 or more officers to a single location to conduct a roadblock at which the statistical likelihood of achieving arrests is minimal.

Plaintiffs also called as a witness the then director of the Michigan State Police, Colonel Gerald Hough. Colonel Hough testified that between eight and 12 officers would operate each roadblock under the guidelines which his department adopted (App. 76a). These officers would be both State Police troopers and members of local law enforcement departments. Colonel Hough conceded that local officers working at sobriety roadblocks might have to be removed from other patrol responsibilities (App. 82a).

Colonel Hough acknowledged that sobriety roadblocks in other states have not produced large numbers of arrests (App. 77a). He conceded that Michigan's sobriety roadblock program was not designed to obtain significant drunk driving arrests, nor could it be justified on the

basis of the limited number of arrests it might ultimately achieve (App. 77a). Colonel Hough maintained, instead, that the roadblock program was designed to deter drunk drivers (App. 77a). However, he further acknowledged that he had no empirical evidence to justify the hope that sobriety roadblocks might deter drunk driving (App. 78a-79a).

Following the presentation of Plaintiffs' case, Defendants called several witnesses, including Lieutenant Raymond Cotton of the Maryland State Police. The Michigan roadblock program has been patterned after Maryland's model (App. 79a). Lieutenant Cotton testified that the only empirical evidence concerning the potential deterrent effect of a sobriety roadblock had to be derived from a three month pilot study conducted in two Maryland counties from December 1982 through February 1983. For that study, Maryland authorities selected two demographically similar counties. In one of these counties sobriety roadblocks were instituted; in the other (the control county), no roadblocks were employed. Following the end of the three month study, the driving statistics in these two counties were analyzed in two respects. The two counties' incidence of alcohol related accidents and alcohol related fatalities during the three month pilot program were compared with their respective statistics for, first, the same three month period one year before, and second, the immediately preceding three month period, September through November 1982.

With respect to the first comparisons, the Maryland statistics indicated that while alcohol related accidents in the county where roadblocks were imposed decreased by 10%, the incidence of such accidents in the control county

was reduced by 11%. In addition, the county in which roadblocks were implemented saw its number of fatal alcohol related accidents more than double, from three in the year before the pilot program to eight during the period of the study. Meanwhile, the control county's fatal accident statistics fell from 16 the previous year to three during the pilot program (App. to Brief In Opp. to Pet. For Cert. 1a).

The comparison between the three months during which the pilot program was instituted and the preceding three months were equally unsupportive of any claimed deterrent effect of sobriety roadblocks. Alcohol related accidents in the county where roadblocks were used fell 16% from the previous three months. However, in the control county, alcohol related accidents fell by 12%. Similarly, the number of fatal accidents in the target county fell by 27%, while it fell 25% in the county where no roadblocks were conducted (App. to Brief in Opp. to Pet. for Cert. 1a).

Ultimately, Lieutenant Cotton was forced to concede that the Maryland pilot study did not establish that sobriety roadblocks acted as a deterrent against drunk driving (App. 119a; Tr. Vol. II, p. 87).

Another of Defendants' witnesses was Lieutenant William Slaughter of the Michigan State Police, who testified concerning the factors which an officer at a roadblock could consider in determining whether an individual who was initially stopped at a sobriety roadblock would be detained for further investigation. These factors could include an odor of alcohol, the driver's manner of speaking, whether the driver's eyes were

bloodshot, whether his or her face was flushed, the general appearance of the driver's clothing, and whether the driver's shirt was unbuttoned (App. 124a-125a). Lieutenant Slaughter further acknowledged that an officer stopping a vehicle at a sobriety roadblock could detain the driver for any one of these reasons or, indeed, for no reason whatsoever (App. 127a).

On July 24, 1986, the trial court issued a comprehensive opinion holding that the Michigan State Police sobriety roadblock program violated rights guaranteed by both the United States and Michigan Constitutions (App. to Pet. for Cert. 26a).

Defendants appealed the trial court's judgment to the Michigan Court of Appeals. In a unanimous opinion dated August 1, 1988, the Court of Appeals affirmed the trial court's determination that the roadblocks constituted an unconstitutional seizure under both the United States and Michigan Constitutions.

On February 22, 1989, the Michigan Supreme Court denied Defendants' Application for Leave to Appeal. Defendants then filed a Petition for Writ of Certiorari which this Court granted on October 2, 1989.

SUMMARY OF ARGUMENT

The sobriety roadblock program proposed by the Michigan State Police violates the Fourth Amendment prohibition against unreasonable searches and seizures.

Sobriety roadblocks involve a seizure for Fourth Amendment purposes. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The seizure of a car and its occupants at a

sobriety roadblock is not based upon any suspicion that the occupants are involved in criminal activity. Moreover, these suspicionless seizures are performed for the sole purpose of enforcing criminal laws prohibiting drunk driving.

A suspicionless seizure which serves only to enforce the criminal law violates the Fourth Amendment. *National Treasury Employees Union v. Von Raab*, ___ U.S. ___; 109 S.Ct. 1384, 1390 (1989); *Skinner v. Railway Labor Executives' Association*, ___ U.S. ___; 109 S.Ct. 1402, 1414 (1989). In these two recent cases, the Court recognized that some measure of individualized suspicion is required for any search or seizure, except where it "serves special governmental needs, beyond the normal need for law enforcement . . . " *Von Raab*, 109 S.Ct. at 1390.

The seizures which take place at a sobriety roadblock serve only the need for the enforcement of the laws related to drunk driving. Consequently, these seizures violate the Fourth Amendment.

Von Raab demonstrates that the suspicionless law enforcement seizures at issue in this case are *per se* unlawful, without reference to a constitutional balancing test. Nevertheless, even if this Court were to apply such a balancing test, *see Brown v. Texas*, 443 U.S. 47, 50-51 (1979), sobriety roadblocks must still be found unconstitutional.

Overwhelming evidence submitted at the trial in this case demonstrated that sobriety roadblocks do not effectively counter the serious problem of drunk driving. The record demonstrated without contradiction that sobriety roadblocks are worthless as a method of effectuating

drunk driving arrests. Indeed, Defendants conceded this point at trial, acknowledging that their program was not even designed to achieve significant numbers of arrests. Defendants maintained, instead, that their program could be justified by deterring drunk driving. However, the evidence presented at trial showed, again without contradiction, that roadblocks are not effective in deterring drunk driving, precisely because they do not lead to significant numbers of arrests.

Sobriety roadblocks, therefore, would involve suspicionless intrusions into the lives of countless innocent people without achieving any positive social benefit. Under the Court's Fourth Amendment balancing test, sobriety roadblocks are therefore unreasonable and, hence, unconstitutional.

ARGUMENT

I. THE MICHIGAN SOBRIETY ROADBLOCK PROGRAM, WHICH INVOLVES THE SUSPICIONLESS SEIZURE OF INDIVIDUALS SOLELY FOR THE PURPOSE OF ENFORCING THE CRIMINAL LAW, VIOLATES THE FOURTH AMENDMENT.

The stopping of vehicles and their occupants under Michigan's sobriety roadblock program constitutes "seizures" within the meaning of the Fourth Amendment. *Brower v. County of Inyo*, ___ U.S. ___; 109 S.Ct. 1378, 1382 (1989); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The question presented to this Court is whether such seizures comply with the dictates of the Fourth Amendment.

The Fourth Amendment prohibits searches and seizures which are unreasonable. This reasonableness standard usually requires that "the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." *Delaware v. Prouse*, 440 U.S. at 654. However, this Court has held that, in some circumstances, the objective standard of probable cause or reasonable suspicion may give way to a balancing test. *National Treasury Employees Union v. Von Raab*, ___ U.S. ___; 109 S.Ct. 1384, 1390 (1989); *Skinner v. Railway Labor Executives' Association*, ___ U.S. ___; 109 S.Ct. 1402, 1414 (1989).

In *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1390, the Court examined those circumstances in which reference to probable cause or some level of suspicion is not required, and the constitutionality of a particular intrusion is to be judged under a balancing test:

> While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, our decision in *Railway Labor Executives* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. As we note in *Railway Labor Executives*, our cases establish that *where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests* to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

Von Raab, 109 S.Ct. at 1390 (citations omitted) (emphasis added); *see also Skinner v. Railway Labor Executive's Association*, 109 S.Ct. at 1414.

In *Von Raab*, this Court was considering the constitutionality of a drug testing program instituted by the United States Customs Service. The Court found that the Customs Service's program was "not designed to serve the ordinary needs of law enforcement," 109 S.Ct. at 1390, and therefore applied a balancing test.

In contrast to the intrusions considered in *Von Raab*, the seizure of motorists under the Michigan State Police sobriety roadblock program is designed to serve only one purpose – the enforcement of criminal laws regarding drunk driving. Such roadblocks are instituted to detect and arrest intoxicated drivers. Quite clearly, these roadblocks serve no special need, "beyond the normal need for law enforcement."

To be sure, the Department of State Police designed its sobriety roadblock program to achieve a broader and laudatory public good – to deter drunk driving and thereby reduce alcohol related traffic accidents. But this broader goal in no way constitutes a special governmental need, beyond the normal need for law enforcement. Accepting such a characterization would render totally meaningless the critical distinction drawn in *Von Raab* and *Skinner*. Since every rational criminal law has as its underlying purpose the deterrence or promotion of a particular form of conduct, a suspicionless search or seizure to enforce the criminal law could always be justified on the basis of its underlying purposes.

The uniquely criminal nature of the seizures involved in a sobriety roadblock is aptly demonstrated by a comparison of Defendants' proposed program with that upheld in *Skinner*. In *Skinner*, the Court considered the constitutionality of regulations promulgated by the Federal Railroad Administration (FRA) which authorized toxicological testing of railway employees under certain circumstances. *Skinner* is, therefore, factually comparable to this case in one important respect. Like the sobriety roadblocks designed by the Michigan State Police, the personal intrusions at issue in *Skinner* were assertedly justified on the basis of "the safety of the traveling public," 109 S.Ct. at 1415, and on the basis of the deterrent effect that such searches would have on the individuals being searched. 109 S.Ct. at 1420. However, before applying a Fourth Amendment balancing test, the Court noted in *Skinner*:

> The FRA has prescribed toxicological tests, not to assist in the prosecution of employees but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'

109 S.Ct. at 1415.[1]

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[1] In a footnote accompanying the quoted text, the *Skinner* Court addressed briefly the allegation that the testing involved in that case could have been employed as a pretext "to enable law enforcement authorities to gather evidence of penal law violations." 109 S.Ct. at 1415, fn. 5. The *Skinner* Court left open the possibility that an administrative scheme such as that involved in *Skinner* could be invalidated on the basis that it was being used as a "pretext" to obtain evidence of criminal

(Continued on following page)

Directly contrary to the situation presented in *Skinner*, the sobriety roadblocks proposed by the Michigan State Police are designed for the express purpose of assisting in the prosecution of drivers who are driving while intoxicated.

The Court's unwillingness to permit suspicionless searches for law enforcement purposes is also reflected in its decision in *New York v. Burger*, 482 U.S. 691 (1987). In that case, the court upheld a suspicionless search of an automobile junkyard. One of the bases for the constitutional challenge presented in *Burger* was that the administrative scheme involved therein was designed only for the purpose of enforcing the criminal law. 482 U.S. at 712-716.

The Court ultimately rejected this challenge, but, in doing so, it was careful to point out that the searches involved therein sought to address a major social problem through both an administrative scheme and penal sanctions. 482 U.S. at 712. In contrast to the dual purpose searches upheld in *Burger*, the seizures which occur at a sobriety roadblock are designed to address a major social problem solely through penal sanctions. Under this

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acts. The Defendants' highly publicized intent to institute sobriety roadblocks to arrest drunk drivers hardly qualifies this program as "pretextual" in nature. But, what an administrative scheme may not accomplish on a "pretextual" basis – enabling law enforcement authorities to gather evidence of penal law violations – *a fortiori* should not be allowed to occur openly and with considerable fanfare.

Court's precedents, these seizures are therefore in violation of the Fourth Amendment. *See* LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' In The Search And Seizure Cases,"* 85 Mich L. Rev. 427 449 (1986); Jacobs and Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U. Cal. Davis L. Rev. 595, 609-610 (1985).[2]

II. UNDER THE RECORD ESTABLISHED IN THIS CASE THE MICHIGAN SOBRIETY ROADBLOCK PROGRAM VIOLATES THE FOURTH AMENDMENT BALANCING TEST.

Even if this Court were to conclude that the constitutionality of the seizures involved in a sobriety roadblock is to be assessed under a balancing test, the program proposed by the Michigan State Police must fail that test.

At the trial, the parties presented significant evidence bearing on this balancing test, with particular emphasis

[2] It does not follow, however, that all roadblock-type seizures imposed by state or local governments would necessarily be found in violation of the United States Constitution. For example, roadside weigh stations, vehicle inspection checkpoints, and other routine regulatory inspections which are not expressly designed for the enforcement of criminal laws would be subject to a balancing test and could well be found constitutionally permissible on that basis. For example, under Michigan law, the State Police may establish temporary vehicle checklanes on roadways throughout the state to detect defective equipment in automobiles. MCL 257.715(b). The equipment violations detected in such searches or seizures are not subject to criminal charges. MCL 257.683(5). Under *Von Raab*, such seizures would be subject to a balancing test.

on the alleged efficacy of roadblock seizures instituted by the Michigan State Police. The court then evaluated the facts established at trial under the Fourth Amendment balancing test prescribed in *Brown v. Texas*, 443 U.S. 47 (1979):

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

Brown v. Texas, 443 U.S. at 50-51 (citations omitted).

Before proceeding to an analysis of the three factors specified in *Brown*, in the light of the record presented here, this brief will address several preliminary issues raised in the briefs *amicus curiae* which have been filed in this Court.

A. The Scope Of The Court's Review Of The "Facts" Presented In The Briefs *Amicus Curiae*.

Ten *amicus curiae* briefs have been filed with the Court in this case. While the focus and analysis contained in each are somewhat different, these briefs share one common thread. Each has attempted to place before this Court statistical data and other evidence allegedly bearing on the central issue which was adjudicated at trial – the effectiveness of sobriety roadblocks in addressing the drunk driving problem.

The data which *amici curiae* attempt to present and the conclusions allegedly supported by that data were, in

all significant respects, incontrovertibly rejected at trial. Dr. Ross testified that his work on the deterrence of drunk driving required him to review every major study published on this subject (App. 41a). Dr. Ross also stated unequivocally that no study of sobriety roadblocks has demonstrated any long-term deterrent effect resulting from their operation (App. 56a). With but one exception, Dr. Ross's views regarding the inadequacy of any statistical support for sobriety roadblocks were completely uncontradicted at trial.[3]

In light of Dr. Ross's testimony, the facts and conclusions which *amici curiae* attempt to present to this Court are, to a large extent, not additions to the record, but rather, they are directly contrary to the only evidence presented to the trial court on this point.

There is, moreover, an additional difficulty presented by the data which *amici curiae* would offer. Since the studies which allegedly support the efficacy of sobriety roadblocks are introduced for the first time in this Court, these studies and their conclusions were not subjected to cross-examination or other tests of their weight during the trial process. In essence, *amici curiae* invite a retrial before this Court of the central issue litigated at the

[3] Defendants did attempt to rely on a Maryland sobriety roadblock program conducted during the years 1982 and 1983. However, this reliance was rejected by the trial court, which agreed with Dr. Ross that the Maryland study did not demonstrate any deterrent effect (App. to Pet. for Cert. 85a-95a). Moreover, Defendants' own witness, Lieutenant Cotton of the Maryland State Police, was forced to concede that the only study of the Maryland program did not demonstrate any deterrent effect (App. 119a; Tr. Vol. II, p. 87).

trial court, without according Plaintiffs the benefit of adversarial proceedings.

This process significantly prejudices the Plaintiffs and also deprives this Court of any accurate assessment of the value of the "evidence" being presented by *amici curiae*. *See* Miller and Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 Va. L. Rev. 1187, 1202 (1988).[4]

The course of the trial in this matter demonstrates the importance of subjecting the "evidence" presented by *amici curiae* to the adversarial process. At trial, Defendants placed considerable reliance upon the experience of the State of Maryland's sobriety roadblock program and the studies which were performed in conjunction with it. The Defendants also called as a witness Lieutenant Raymond Cotton of the Maryland State Police. On direct examination Lieutenant Cotton explained the Maryland studies which he had helped prepare, and, on the basis of these studies, he asserted that sobriety roadblocks are an effective deterrent against drunk driving (App. 118a).

[4] Plaintiffs acknowledge that there is a well-established history of so-called Brandeis briefs in this Court. It is, however, important to note the observations made by the Court in accepting the non-record evidence contained in the original Brandeis brief: "(W)e take judicial cognizance of all matters of general knowledge." *Mueller v. Oregon*, 208 U.S. 412, 421 (1908). In contrast to the evidence submitted by *amicus curiae* in *Mueller*, *amici curiae* herein have produced data and conclusions which are far from matters of general knowledge, but, instead, go to the central factual issue litigated at trial.

Lieutenant Cotton was then subjected to lengthy cross-examination regarding the methodology and conclusions of the Maryland studies as well as the broader context in which these roadblocks were imposed. At the conclusion of that cross-examination, he was forced to concede that the deterrent effect of the subject roadblocks was not supported by any empirical evidence (App. 119a; Tr. Vol. II, p. 87). And, on the basis of this cross-examination, the trial court concluded that the Maryland experience with sobriety roadblocks did not substantiate any deterrent effect (App. to Pet. for Cert. 87a-92a).

Like the various studies cited by *amici curiae*, the Maryland studies deemed sobriety roadblocks a success. However, when subjected to the adversarial process, that claimed success proved entirely illusory. This experience reaffirms that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *cf. California v. Green*, 399 U.S. 149, 158 (1970). Quite obviously, Plaintiffs will not have the opportunity to analyze the studies and data cited by *amici curiae* or to expose their weaknesses through cross-examination.[5] For these reasons, the invitation by *amici curiae* to consider non record "facts" or evidence is not only prejudicial to the Plaintiffs, but also contrary to the fundamental structure of the adversary system.

[5] For these reasons, the Michigan Court of Appeals issued an order striking any references to matters not contained in the trial record from the brief which Defendants filed in that Court.

The citation to studies and other data outside the record is also inconsistent with this Court's rulings in various Fourth Amendment cases. In *Prouse*, 440 U.S. at 659, the Court based its conclusion that a particular law enforcement procedure was ineffective solely on the evidence presented at trial:

> The question remains, however, whether in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail. *On the record before us*, that question must be answered in the negative.

Prouse, 440 U.S. at 659 (emphasis added).

The Court's exclusive focus on the actual record in *Prouse* has been repeated in its evaluation of the efficacy of other searches and seizures challenged under the Fourth Amendment. *See e.g. Skinner*, 109 S.Ct. 1402, 1421 (1989) (The Court of Appeals erred because the record indicates that toxicology tests are highly effective.); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976) (The need for immigration checkpoints is demonstrated by the records in the cases.).

Two *amici curiae* have asserted that this Court may consider evidence which is not a part of the record because the issue of whether sobriety roadblocks are an effective law enforcement tool is a "legislative fact."[6] This

[6] This argument is contained in the briefs *amicus curiae* filed by the United States (p. 21), and the National Governors' Association, *et al.* (pp. 16-17).

argument is, however, directly contrary to the Court's decision in *Prouse*, 440 U.S. at 659, which applied the balancing test only to the actual record presented.

In an effort to support their position that the alleged efficacy of roadblocks involves "legislative facts," both *amici curiae* cite *Lockhart v. McCree*, 476 U.S. 162 (1986). In dictum in that case, the Court expressed reservations regarding the applicability of the "clearly erroneous" standard of review contained in Federal Rule of Civil Procedure 52(a) to the trial court's findings. 476 U.S. at 168, n.3. The Court's observations in *Lockhart* might bear on the scope of its own review of the record presented below, but *Lockhart* provides no justification whatsoever for a consideration of facts which are not contained in the record.[7]

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[7] The United States has also argued that because the Michigan sobriety roadblock program was operated only once, this case involves a facial constitutional challenge which "cannot be evaluated on its own record." Brief *amicus curiae* of the United States, p. 21. This argument is extremely ironic in that the instant case probably contains the most extensive factual record ever developed on the question of the effectiveness of sobriety roadblocks. But this argument also misses the point. If the present case involves a facial challenge, it is a facial challenge to a particular roadblock program which was designed by its proponents to accomplish a particular goal. Thus, when the Defendants conceded at trial that their program cannot be justified on the basis of the limited number of arrests which it accomplishes, and the uncontroverted testimony at trial demonstrated a direct relationship between arrests and any possible deterrence, this case can indeed be "evaluated on its own record."

For the foregoing reasons, the constitutional balancing test must be conducted in light of only that evidence adduced and tested at trial. The asserted "facts" recited in the *amicus curiae* briefs must not be given any weight in the balancing process.

B. The Non-Record "Facts" Presented By *Amici Curiae*.

The record in this case should provide the sole factual basis for this Court's decision. However, even if this Court were to consider the submissions of *amici curiae* which are not part of this record, the effectiveness of sobriety roadblocks still cannot be established.

For example, six *amici curiae* rely upon the results of a 1984 study of two counties in Maryland and Virginia to support the view that sobriety roadblocks increase the public perception of enforcement of drunk driving law. *See* Williams & Lund, *Deterrent Effects of Roadblocks on Drinking and Driving*, 3 Traffic Safety Evaluation Res. Review 7 (1984). Not surprisingly, *amici curiae* omit from their briefs any mention of this study's conclusion: namely, that sobriety roadblocks had no effect whatsoever on the driving behavior of the public in the two counties analyzed. Id. at 17. The Williams and Lund study thus supports, rather than refutes, the evidence presented at trial and the factual findings made by the trial court.

A number of *amici curiae* have also referred to the approval of the sobriety roadblock concept by the National Transportation Safety Board (NTSB). National Transportation Safety Board, *Deterrence of Drunk Driving:*

The Role of Sobriety Checkpoints and Administrative License Revocation, NTSB/SS-84/01, Washington D.C. (1984). Yet, in this study, the NTSB found that sobriety roadblocks "are not the most efficient arrest-producing technique . . . " *id.* at 9, and it further determined that no study which it reviewed established a direct relationship between sobriety roadblocks and a reduction in alcohol related accidents. *Id.* at 7, 9. It was only because the NTSB determined that roadblocks "could" produce a deterrent effect or were "believed" to have such an effect, that it recommended this technique. *Id.* at 5.

Several *amici curiae* have also cited regulations promulgated by the National Highway Traffic Safety Administration (NHTSA) as supportive of the efficacy of a sobriety roadblock program. Yet, the NHTSA has itself published a study which concluded that no deterrent effect was demonstrated through use of a roadblock program. NHTSA, 3 *Traffic Safety Evaluation Research Review* 5, Nov.-Dec. 1984.

Another study which was not part of the record in this case concerns a Charlottesville, Virginia sobriety roadblock program conducted during 1984. As several *amici curiae* have pointed out, this study found that alcohol related accidents in Charlottesville decreased during the year that the roadblocks were in operation. Again, however, *amici curiae* have omitted mention of critical facts pertaining to this study. During the period of the Charlottesville study, alcohol related accidents declined in the entire State of Virginia, and the authors of the Charlottesville study noted that this state-wide decline may have been caused by legislation enhancing drunk driving penalties which became effective in Virginia in

1984. Department of Transportation HS 806 989, *Evaluation of Charlottesville Checkpoint Operations*, p. 45. As a result of the state-wide reduction in alcohol related accidents and the unknown effect of the 1984 legislation, the Charlottesville study did not find the reduction of alcohol related accidents in that city to be sufficiently significant to be attributed to sobriety roadblocks. *Id.* at 46.

Moreover, the Charlottesville study further demonstrated that, despite the visibility of the roadblock program, drivers in that area did not perceive sobriety roadblocks as increasing the probability of being arrested for drunk driving. *Id.* at 31. Ultimately, the Charlottesville study found that the accumulated data do not permit a final conclusion regarding the effectiveness of these roadblocks.

Amici curiae have also attempted to rely on a roadblock program which has been instituted in Australia. However, for the reasons stated in the brief *amicus curiae* filed on behalf of the Insurance Institute of Highway Safety, *et al.*, at 13-14, n. 43, the results obtained in Australia cannot be attributed to roadblocks alone, nor, in light of the significant differences between the Australian program and the Michigan program, can the Australian results be applied to this case.

Space limitations do not allow Plaintiffs to note the specific flaws of each non-record "fact" regarding the potential efficacy of sobriety roadblocks which *amici curiae* would have this Court consider. However, for reasons similar to those noted in critiquing the aforementioned "data," none of the "evidence" contained in the briefs *amicus curiae* filed in this case detracts from the central

finding below that the sobriety roadblock program involved in this case will neither be an effective arrest tool nor have any long term deterrent effect.

C. The Constitutional Balancing Test.

1. Gravity of the Public Concern.

Plaintiffs do not dispute that drunk driving is a serious societal problem. Rather, Plaintiffs have contended and the trial record established that sobriety roadblocks constitute an ineffective as well as unconstitutional response to that problem.

2. The Degree to Which the Seizures Advance the Public Interest.

This element of the Fourth Amendment balancing test was the central focus of the evidence presented below. That evidence demonstrated that sobriety roadblocks are ineffective in addressing the serious problem of drunk driving.

Dr. Lawrence Ross testified that as a means of directly removing drunk drivers from the road through on-the-scene arrests, sobriety roadblocks are "worthless" (App. 56a). This assessment of the inadequacy of sobriety roadblocks as an arrest tool was shared by every witness at trial. Indeed, Dr. Ross's conclusions were completely supported by Defendants' own witnesses.

Colonel Hough and Inspector Leroy Fladseth of the Michigan State Police both acknowledged that the statistical evidence involving sobriety roadblocks demonstrated that these roadblocks could not be justified by the

limited number of arrests achieved (App. 77a; Tr., Vol III, p. 27).

For these reasons, the Defendants did not even attempt to justify sobriety roadblocks on the basis of the number of arrests obtained. Instead, the Guidelines authored by the Michigan State Police identified deterrence of drunk driving as the program's goal. (App. to Pet. for Cert. 146a.) Based on this overwhelming and uncontradicted evidence, the trial court found that "sobriety checkpoints have not been shown to be an effective means for apprehending drunk drivers." (App. to Pet. for Cert. 83a.)

While Defendants conceded that sobriety roadblocks could not be deemed effective on the basis of the limited number of arrests attained, they claimed that sobriety roadblocks might nonetheless reduce the incidence of drunk driving in Michigan by acting as a deterrent. As the trial court found, though, Defendants' deterrence argument was equally unsupportable.

Dr. Ross testified that any enforcement program which raises the public consciousness with respect to the drunk driving problem and holds out the prospect of increased risk of detection may have a short-term positive effect on drunk driving statistics. However, as Dr. Ross explained, the long term effect of any drunk driving program must be based on the public's perception that the program does, in fact, enhance the prospect of arrest for drunk driving. In Dr. Ross's terms, the driving public is subject to a learning curve – once it learns that the

prospect of being detected and punished for drunk driving is not as great as it was led to believe, any potential deterrent effect ends.

The significance of Dr. Ross's testimony was fully explored by the trial court, which made a number of critical factual findings. The trial court noted that Dr. Ross's testimony regarding the relationship between arrests and deterrence was uncontradicted (App. to Pet. for Cert. 79a, n. 10), and, on this basis, found that "[t]he degree to which a particular law enforcement program can be successful in achieving arrests must be seen as directly related to the program's usefulness in deterring a problem" (App. to Pet. for Cert. 77a).

Based on the relationship between the number of arrests and the deterrent value of the sobriety roadblock program, the trial court concluded:

> [S]obriety checkpoints cannot be expected to achieve any significant level of apprehending drunk drivers. This finding, in the Court's opinion, essentially undermines the whole theoretical basis for concluding that checkpoints can be effective in deterring drunk drivers, (i.e., that the public would fear being arrested for drunk driving if sobriety checkpoints were implemented, and thus, would not engage in drunk driving). Once the public perceives the truth about the low chance of a drunk driver actually being apprehended in a sobriety checkpoint, it cannot be reasonably supposed that those who are inclined to drink and drive will perceive a sobriety checkpoint as a significant threat to their being arrested.

App. to Pet. for Cert. 95a-96a.[8]

Thus, as the trial court found, Defendants cannot concede that sobriety roadblocks achieve few arrests and, at the same time, attempt to justify the imposition of these intrusions on the basis of a speculative deterrent effect.[9]

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[8] The trial record in this case demonstrates that there is an additional factor at work which undermines any significant deterrent effect of sobriety roadblocks. There is no dispute among any of the parties in this case that, to the extent any positive effect can be achieved through a roadblock program, it must come about because sobriety roadblocks are highly visible. Thus, as Colonel Hough testified at trial, media attention focusing on such a program is a necessity (Tr. Vol. I, pp. 90-91). However, Colonel Hough acknowledged that media coverage of sobriety roadblocks will necessarily wane over time (Tr. Vol. I, p. 92). This phenomenon was confirmed by Lieutenant Cotton, who indicated that publicity of the Maryland roadblock program dropped off after an initial flurry (Tr. Vol. II, p. 120). The Charlottesville study, which several *amici curiae* have cited to this Court, also noted this pattern. Driver awareness of the Charlottesville roadblock program was higher four months after its inception than it was seven months later due to reduced media coverage. DOT HS 806 989, pp. 26-27. Since the underlying rationale of a deterrence based roadblock program is to increase public perception of the risk of arrests due to this procedure, the natural reduction in media attention will correspondingly reduce whatever deterrent effect the Defendants might rely upon.

[9] Perhaps because of Dr. Ross's testimony and the trial court's conclusions, the Defendants have now completely

(Continued on following page)

In an attempt to counter this uncontradicted evidence, the Defendants initially relied upon statistics derived from a State of Maryland sobriety roadblock study to suggest a possible deterrent effect. However, the two representatives of the Michigan State Police who had any familiarity with the Maryland study, Colonel Hough and Lieutenant Slaughter, candidly acknowledged that they knew of no data from Maryland supporting the view that sobriety roadblocks act as a deterrent (App. 78a-79a, 122a).

Defendants also called Lieutenant Raymond Cotton of the Maryland State Police, who had helped author the report on the Maryland study. Yet, even Lieutenant Cotton ultimately was required to acknowledge that the Maryland sobriety roadblock program was not shown to have had any deterrent effect (App. 119a; Tr. Vol. III, p. 87).

(Continued from previous page)

reversed their position on this point. At trial, Defendants' witnesses asserted that the Michigan sobriety roadblock program was not designed to achieve significant numbers of arrests (App. 77a), and that the number of arrests obtained by means of roadblocks was "not all that important" to the program's success (Vol. III, p. 27). In their brief before this Court, however, Defendants have repeatedly suggested that sobriety roadblocks can be justified on the basis of the number of arrests obtained (Brief for Petitioners, pp. 20, 40, 46, 48, 49). The Defendants' striking reversal is not only a repudiation of *all* evidence presented on this point at trial, it is also a repudiation of Defendants' own Guidelines which identify deterrence, not number of arrests, as this program's goal (App. to Pet. for Cert. 146a).

The statistics derived from the Maryland study were addressed at length in the trial court's opinion (App. 83a-92a). Based on this analysis, the trial court concluded that the Maryland data "does not support the deterrent effects of checkpoints" (App. 92a).

In addition to demonstrating that sobriety roadblocks are not effective in arresting or deterring drunk drivers, Plaintiffs also presented considerable evidence indicating that the roadblock program proposed by the Michigan State Police is, at best, unnecessary in the fight against drunk driving, or, at worst, counterproductive.

Dr. Ross noted that the Michigan sobriety roadblock program could have the opposite effect from that contemplated by its proponents. As Colonel Hough testified, under the Defendants' Guidelines, only one sobriety roadblock would be in operation on any given night, and the county in which the roadblock is to be employed would be announced in advance and given extensive publicity (App. 80a). Dr. Ross noted that such a program would be no threat whatsoever to an individual outside the targeted county. Even worse, he further testified that the resulting program could actually be counterproductive, by suggesting to drivers outside the targeted county that their chances of being detected for drunk driving were reduced because of the concentration of police resources elsewhere (App. 74a).

Furthermore, the three county sheriffs who testified at trial each indicated that the Michigan roadblocks, which require eight to twelve officers to be stationed at a specific location, would constitute a less effective use of

police resources than traditional roving patrols. This testimony regarding the efficacy of patrols was substantially corroborated by witnesses from the Michigan State Police who testified that State Police officers receive considerable training in detecting drunk drivers based on objective driving characteristics, and are highly skillful in detecting and arresting such drivers (App. 120a-121a; Tr. Vol. I, pp. 65-66).

After reviewing the entire record, the trial court concluded that sobriety roadblocks are neither an effective means of detecting drunk drivers, nor do they have any significant deterrent effect. (App. 101a-102a.)

The Michigan Court of Appeals affirmed these findings. *Sitz v. Department of State Police*, 179 Mich App 433; 429 NW2d 180 (1988). That court noted that the State Police Guidelines recognized the necessary relationship between actual arrests obtained and any deterrent value to be achieved through the program. *Id.* at 441. The Michigan Court of Appeals further noted that the Guidelines on which the State Police program is based provide that the roadblocks' primary objective is to "increase the perception of 'risk of apprehension' in the minds of [drinking] drivers." *Id.* Since the evidence that sobriety roadblocks are not an effective means of achieving arrests was uncontradicted, *id.* at 442, the Michigan Court of Appeals affirmed the trial court's determination that "sobriety checkpoints [are] not an effective means of combating drunk driving." *Id.* at 443; App. 20a.

Both the trial court and the Michigan Court of Appeals, therefore, found that the second element of the *Brown v. Texas* balancing test weighed in favor of Plaintiffs. Defendants seriously misstate the conclusions rendered below in asserting that sobriety roadblocks were found by these courts to be somewhat effective. In actuality, the Michigan Court of Appeals held that the trial court was correct "in finding that sobriety checkpoints were not an effective means of combating drunk driving." *Sitz*, 179 Mich App at 443.

3. The Severity of the Interference with Individual Liberty.

The final factor in the *Brown v. Texas* standard requires an examination into the extent of the intrusion caused by sobriety roadblocks. This determination has usually been divided into two components, the objective and subjective nature of the intrusion. *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-559 (1976).

Based on the short amount of time that each car is required to stop, the trial court concluded that the objective intrusion of a sobriety roadblock was minimal (App. to Pet. for Cert. 104a). However, this analysis of the original stop does not take into consideration all the factors relevant to the objective intrusion.

First, based on the statistics generated in almost every sobriety roadblock study that has been conducted, over 99% of the automobiles subjected to this form of intrusion will be allowed to pass through the roadblock without an arrest for criminal activity. To accurately reflect the scope of the intrusion posed by sobriety roadblocks, the Court's balancing test must, therefore, not be confined to the intrusion upon a single automobile.

Rather, this Court should consider the legion of responsible and lawful drivers who would be unnecessarily subjected to this type of intrusion, however brief. In assessing the intrusiveness of roadblock seizures, the Court must take into account their overall impact on legitimate traffic. *United States v. Martinez-Fuerte*, 428 U.S. at 558-559; *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-883 (1975); *see generally* Strossen, *The Fourth Amendment In The Balance*, 63 N.Y.U. L. Rev. 1173 (1988).

The scope of sobriety roadblocks' intrusiveness is significantly broader than that contained in a single brief stop for an additional reason. If suspicionless seizures of automobiles and their occupants at a sobriety roadblock were permitted, several results would necessarily follow which would involve substantial intrusion into individual privacy and liberty. After effectuating the stop of an automobile at a sobriety roadblock, the officer could compel the car's driver and passengers to get out of the car, *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); once the occupants are out of the vehicle, the officer could subject them to pat-down searches, *id.* at 111-12; the officer could further require the driver to produce a license or other vehicle documents, *Texas v. Brown*, 460 U.S. 730 (1983); should the driver open the car's glove compartment to produce these documents, the officer could shift position to examine the contents of the glove compartment, *id.*; and the officer could shine a flashlight into the car's passenger compartment and visually inspect its contents and occupants, *id.*

During cross-examination, Inspector Fladseth acknowledged that all of the foregoing actions would be

constitutionally permissible if the original roadblock seizure is adjudged constitutional. He further acknowledged that there is an undeniable potential for police abuse in such a program (Tr. Vol. III, pp. 50-51).

Another aspect of the sobriety roadblock program designed by the Michigan State Police further increases the intrusion inherent in all roadblock seizures. Defendants and *amici curiae* have alleged that the roadblock approach removes discretion from the officer conducting the stop. But this is only partially correct. By requiring roadblock officers to stop *all* cars, the Michigan program does deny the officers any discretion in selecting which cars will be subject to a brief initial stop. However, as the evidence presented at trial established, the critical determination of whether a driver is to be detained for additional and more intensive investigation and testing is left totally to the discretion of the officer conducting the stop.

Colonel Hough testified that it was up to the checkpoint officer to determine who would be detained further (App. 81a). Lieutenant Slaughter elaborated on this discretion. According to him, an officer could look to a number of factors in making the decision to detain a motorist for further examination. The officer could base his decision on a strong odor of alcohol in the car, the condition of the driver's clothing, or whether the driver's shirt was completely buttoned (App. 124a-125a). Lieutenant Slaughter further testified that any one of these factors could be enough to convince the roadblock officer to require further investigation of the driver (App. 126a). Lieutenant Slaughter even acknowledged that a driver could be required to submit to further testing for no objective reason whatsoever (App. 127a).

Defendants have sought to minimize the intrusiveness of their roadblock program by suggesting that the Guidelines which they have drafted remove any authority from the officers in the field. This claim is, however, belied by the testimony of Colonel Hough and Lieutenant Slaughter. That uncontradicted evidence conclusively shows that, in fact, roadblock officers necessarily exercise wide discretion in determining which detained motorists will be subjected to additional and far more invasive investigations. This substantial discretion inevitably vested in roadblock officers perhaps accounts for another disquieting statistic revealing the substantial intrusiveness of roadblock programs.

Defendants' brief announces that the May 1986 roadblock conducted in Saginaw County was "a successful operation." (Defendants' Brief, p. 11.) This announcement comes without explanation for the limited number of arrests achieved during that roadblock, and without comparison of the number of arrests which could have been achieved if the 17 officers participating in that operation had each spent an equal amount of time using traditional police methods. Even putting these concerns aside, the record also shows that of the 126 drivers who passed through that roadblock, only two were detained for further examination and questioning, and only one of these two was arrested (Tr. Vol. III, p. 89). Thus, after being screened by the initial roadblock officer, as many drivers were released after being forced to undergo further examination and testing as were arrested for drunk driving. Such serious intrusions into the privacy interests of

innocent drivers have also been documented in other, more extensive studies of sobriety roadblock operations.[10]

The foregoing statistics demonstrate that sobriety roadblocks constitute a significant intrusion into the privacy interests of numerous law abiding citizens. *See generally,* Jacobs and Strossen, 18 U. Cal. Davis L. Rev. at 650-652 (1985). These additional concerns must be considered in assessing the nature of the objective intrusion.

In addition to their objective intrusiveness, sobriety roadblock stops further invade privacy through their significant subjective intrusiveness, as both the trial court and the Michigan Court of Appeals found. After extensive analysis of both the record and relevant judicial opinions, the trial court concluded that "the subjective intrusion on individual liberty interests which would be

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[10] The only other evidence on this point considered at trial demonstrated even more severe intrusions into the privacy interests of innocent motorists. During Maryland's sobriety roadblock program, forty drivers were forced to undergo more extensive investigations, but only 17 of these were eventually arrested (Tr. Vol. II, pp. 64-66). Maryland's study indicates that the individuals subjected to full-fledged investigations at sobriety roadblocks are more likely than not completely innocent of drunk driving offenses. The number of sobriety roadblock "false positives" is even more striking in the non-record studies which *amici curiae* would have this Court consider. For example, in the Charlottesville study approximately 940 people were detained for further investigation, but only 290 of these individuals were arrested for drunk driving. DOT HS 806 989, p. 5. In a Delaware study, 701 people were further detained and investigated, after which only 231 were arrested. NTSB/SS-84/01, p. 10.

caused by the sobriety checkpoints was substantial." (App. to Pet. for Cert. 123a-124a.) The Michigan Court of Appeals held that there was sufficient evidence to support the trial court's conclusions on this point. (App. to Pet. for Cert. 22a.)

The roadblocks designed by the Michigan State Police are to be conducted at night. A driver approaching a roadblock may well be traveling on a darkened, little traveled state highway when confronted by a sign announcing a roadblock. Approximately a quarter of a mile later, that driver would discover a large area illuminated by four halogen lights, containing eight to 12 police officers, numerous police cars, and other support vehicles. Fear and anxiety would be an understandable reaction to such a scene. As the court observed in *State v. Smith*, 674 P.2d 562 (Ok. Crim. App. 1984):

> The roadblocks in the present case could well act, and most likely did act, as a total surprise to those passing through. The fear factor involved in this case is heightened by the presence of at least 10 officers, chemical testing equipment, and mobile booking and jail vans actually on the scene. To the individual approaching such a roadblock, it is not unlikely that he would reasonably perceive the officers as being desirous of arresting criminals, and that anyone passing through could easily be arrested.

Id. at 564.

Unlike the roadblocks considered in *Martinez-Fuerte*, 428 U.S. at 559, the roadblocks involved in this case will be conducted at night and are not fixed, but will instead be moved to different locations. And, far from attempting

to minimize a driver's surprise, sobriety checklanes are based precisely on surprise.

D. Application Of The Balancing Test To The Record.

The record in this case demonstrates that the sobriety roadblocks proposed by the Michigan State Police simply do not accomplish the goal of detecting or deterring the drinking driver. The failure of such roadblocks to promote any legitimate public interest renders them unreasonable under the constitutional balancing test.

Absent proof of the effectiveness of such roadblocks, the Michigan State Police would seek to justify an official intrusion based solely on the existence of a serious public concern, which, regardless of its gravity, is not effectively addressed by the seizures being imposed. But, the serious public concern with drunk driving cannot, alone, justify any governmental intrusion. Rather, even a minimal intrusion into an individual's privacy or security will be deemed reasonable only if it actually promotes a governmental interest.

The Court so ruled in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), which involved the suspicionless searches of automobiles near the United States-Mexico border. The government sought to justify these intrusions based on the intractable problem of illegal immigration. The Court, however, rejected this rationale: "It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one." 413 U.S. at 273. Similarly, the fact that drunk driving is a

serious problem in the State of Michigan cannot, in and of itself, allow the mass seizure of innocent motorists proposed by the Defendants.

In short, this Court's constitutional balancing test mandates the conclusion that any suspicionless seizure which does not effectively promote a governmental interest is unreasonable under the Fourth Amendment. Accordingly, the Michigan State Police sobriety roadblock program is constitutionally defective.

Defendants and *amici curiae* have suggested that other attributes of a sobriety roadblock program tip the balance in favor of its constitutionality. They particularly emphasize that the roadblocks will assertedly remove any discretion from the field officers engaged in the seizure.[11] Even assuming, *arguendo*, that police discretion actually were minimized, this factor alone could not tip the balancing test in favor of sobriety roadblocks. In so arguing, Defendants and *amici curiae* exaggerate the weight which should be accorded to reduced police discretion.

This Court explored the appropriate role of constrained discretion on the Fourth Amendment balancing equation in *United States v. Martinez-Fuerte*, 428 U.S. at 557-559. In that case, the Court held that the routine

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[11] As noted previously, only the decision involving which cars will be subjected to the initial stop is removed from the discretion of the officer at the scene. In contrast, decisions concerning which drivers will be subjected to prolonged detention and investigation are vested solely in the officer's discretion. And, as Inspector Lieutenant Slaughter acknowledged, the officer could exercise that discretion for any reason or for no reason (App. 127a).

nature of a roadblock-type stop was relevant to the third factor in the balancing test discussed above, the scope of the intrusion. In *Martinez-Fuerte*, the Court found that a fixed checkpoint stop at the border did not intrude significantly into motorists' privacy rights. 428 U.S. at 557-559. In arriving at this conclusion, the Court distinguished checkpoint stops from random stops of automobiles, which raised "a grave danger that such unreviewable discretion would be abused by some officers in the field." 428 U.S. at 559. *See also Delaware v. Prouse*, 440 U.S. at 661.

Martinez-Fuerte demonstrates that the scope of an intrusion may be decreased by a routine program which removes or reduces the amount of discretion vested in officers in the field. But *Martinez-Fuerte* also demonstrates that the reduction of on-the-scene police discretion is merely one of the factors which must be incorporated into the balancing test, as demonstrated by the Court's balancing analysis in that case. The fact that *Martinez-Fuerte* engaged in such a balancing test belies Defendants' suggestion that a search or seizure which involves limited field officer discretion is, *ipso facto*, constitutional.

The mass seizures proposed by the Michigan State Police, therefore, cannot be constitutionally justified solely on the basis that the officer in the field has no discretion in choosing which cars will be subjected to a stop. Nor does the limitation on the officer's discretion exempt the seizures involved herein from the balancing test which this Court has employed. Thus, the limits placed on the officers in the field may minimize to some extent the scope of the intrusion implicit in a sobriety roadblock, *Martinez-Fuerte*, 428 U.S. at 558-559, but this does not alter the fact that the particular stops at issue

here, in contrast to those upheld in *Martinez-Fuerte*, advance no public interest.

The argument that sobriety roadblocks should be upheld because of the allegedly limited discretion vested in field officers is flawed for another reason. It reflects an unduly narrow view of the Fourth Amendment's proper scope. At its most basic, the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government . . . " *Skinner v. Railway Labor Executives' Association*, 109 S.Ct. at 1411. The Fourth Amendment, therefore, governs all forms of official conduct, not simply the conduct of officers on the street. Furthermore, the Fourth Amendment undeniably protects *people* from unreasonable searches and seizures, *Katz v. United States*, 389 U.S. 347, 351-353 (1967). And, from the perspective of a person subjected to a sobriety roadblock, it might be of little interest or consolation that the decision to intrude was made in the state capitol or in the county seat, not by the officer conducting the roadblock.[12] *Cf.* Amsterdam, *Perspectives On The Fourth Amendment*, 58 Minn. L. Rev. 349,

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[12] This is not to suggest that the vesting of broad discretion in officers on the street does not raise the prospect of serious abuse, worthy of constitutional concern. *United States v. Brignoni-Ponce*, 422 U.S. at 882-883; *see also Kolender v. Lawson*, 461 U.S. 352, 360-361 (1983). But while the existence of unbridled discretion on the part of officers in the street raises constitutional concerns, it does not necessarily follow that the elimination of that discretion insulates a particular intrusion from constitutional attack. If this were so, the Court's reference to and inquiry into a balancing test in *Martinez-Fuerte* would have been unnecessary.

411 (1974). Jacobs and Strossen, 18 U. Cal. Davis L. Rev. 663-664.

Defendants and several *amici curiae* have also asserted that the trial court's execution of the balancing test was flawed by its consideration of other law enforcement methods available to the Defendants to fight drunk driving. This Court has recognized that the reasonableness of a particular seizure does not invariably turn on the possible existence of alternative "less intrusive means." *Skinner*, 109 S.Ct. at 1419, n. 9; *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). The trial court's decision is completely consistent with this principle.

The trial court expended considerable effort identifying the intrinsic ineffectiveness of sobriety roadblocks in terms of both arrests and deterrence (App. to Pet. for Cert. pp. 74a-95a). Only after concluding that such roadblocks were ineffective did the trial court turn to an analysis of other law enforcement techniques (App. to Pet. for Cert. pp. 96a-102a). And, that consideration was entirely warranted. While this Court has refrained from deciding the reasonableness of a particular police practice solely based upon the availability of other, less intrusive means, it has also recognized that the utility of a particular seizure may be affected by the existence of other police practices.

For example, in applying the balancing test in *Prouse* to invalidate spot checks for drivers' licenses as not sufficiently productive to justify the resulting intrusion, the Court specifically noted the existence of alternative enforcement measures: "Given the alternative mechanisms available, both those in use and those that might be

adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment." 440 U.S. at 659.

As *Prouse* held, the constitutional balancing test encompasses not only consideration of a seizure's effectiveness in promoting a particular law enforcement goal, but also the need for that seizure. *See e.g. New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); *Martinez-Fuerte*, 428 U.S. at 556-557; *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967). The trial court explicitly recognized this fact (App. to Pet. for Cert. 75a), and it was in this context that that court considered the evidence of other law enforcement techniques available.[13]

The evidence in this case indicated that sobriety roadblocks are ineffective in arresting or deterring drunk drivers. Moreover, as emphasized by the three county sheriffs who testified at trial, by diverting officers from

[13] The trial court's findings with respect to other available law enforcement mechanisms in the battle against drunk driving also distinguishes this case from several other searches and seizures which this Court has upheld. In a number of cases beginning with *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court has supported the reasonableness of a particular search or seizure by noting it constitutes "the only effective way" to accomplish an important societal good. *Camara*, 387 U.S. at 535; *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983); *Donovan v. Dewey*, 452 U.S. 594, 602-603 (1981); *United States v. Biswell*, 406 U.S. 311, 316 (1972). In contrast, there are other means for detecting and deterring drunk drivers which are more effective than the challenged roadblocks. *Cf.* Jacobs and Strossen, 18 U. Cal. Davis L. Rev. at 616-619.

more effective and efficient methods of removing drunk drivers from the road, sobriety roadblocks actually undermine law enforcement efforts to combat drunk driving.[14]

For these reasons the courts below properly held that the seizures of motorists under the Defendants' sobriety roadblock program is unlawful under a constitutional balancing test.

[14] The balancing test prescribed in *Brown* requires a determination of how a particular official measure advances the public interest. It is, therefore, totally uninstructive and completely irrelevant to suggest (as several *amici curiae* have done in this Court) that the efficacy of sobriety roadblocks is somehow established by a comparison of the arrest statistics achieved through this measure and the rate at which illegal immigrants are detected at fixed border checkpoints, *see Martinez-Fuerte*, or the percentage of positive results in blood or alcohol tests of railroad workers. *See Skinner.*

CONCLUSION

Based on the foregoing, the judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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